IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 306 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHHANAJI MALAJI

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

PUBLIC PROSECUTOR for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 04/05/2001

ORAL JUDGEMENT

#. Rule. Learned Assistant Public Prosecutor waives service of rule on behalf of the respondents.

#. Prayer has been made by the petitioner in this petition to direct the respondents to release him on

furlough leave.

#. The facts of the case are that the petitioner was convicted and sentenced to suffer rigorous imprisonment for life by the learned Sessions Judge, Mahesana for the offence under section 302 of I.P.C. on 13th July, 1992. This conviction and sentence was brought to the notice by the petitioner before this Court by filing criminal appeal. It is not in dispute that this court has already dismissed that appeal of the petitioner. So this conviction and sentence attained the finality. It is stated that the petitioner is in jail since more than ten years including undertrial period. It is stated that the petitioner has enjoyed three times temporary bail and one time furlough leave. It is submitted that in the year 1995, the petitioner surrendered late by 650 days. It is averred that for that late surrender, the jail authority has already punished the petitioner by way of cut off his remission for one day to one day two months Danda Bedi, his canteen facility was stopped for two months and further his one furlough has been ordered to be forfeited. The petitioner's furlough became due in the month of October, 2000. He made an application for furlough to the respondent No.3 on 30th October, 2000. This application came to be rejected by the respondent No.3 under his order dated 3rd January, 2001. Hence, this special criminal application.

#. Learned counsel for the petitioner contended that the denial of furlough leave on the ground of late surrender by the petitioner in the year 1995 amounts to double penalty. In her submission, for this late surrender, the petitioner has already been adequately punished and it cannot be taken to be a ground to deny him his due furlough. In case it is permitted then for all the time to come, the petitioner will not get any furlough leave. In support of her contention, learned counsel for the petitioner placed reliance on the Full Bench decision of this Court in the case of Bhikhabhai Devshi vs. State of Gujarat reported in AIR 1987 Guj 136. It has next been contended that the respondent No.3 has given another ground for rejection of application of the petitioner i.e. adverse police report. The police reported that the release of the petitioner on furlough leave will result in disturbance of public peace. In her submission, the learned counsel for the petitioner stated that the petitioner has not been furnished with the copy of the adverse police report and reliance thereon put by the respondent No.3 is against the basic principles of natural justice and fairplay.

#. In contra, learned counsel for the respondents submitted that the petitioner earlier had late surrendered and it is a good ground for rejection of his application. It is true, what the learned counsel for the respondents contended, that for late surrender the petitioner is punished but this conduct of the petitioner may be taken to be a ground for rejection of his application in future. It has next been contended that the adverse police report is correct as during the period of late surrender by the petitioner, he committed an offence punishable u/s. 395 of IPC. In view of this fact, what the learned counsel for the respondents submit that it is not in the public interest also to extended the benefit of furlough in favour of the petitioner. However, learned counsel for the respondents fairly concede that copy of the adverse police report was not furnished to the petitioner.

#. In rejoinder, Ms. Subadhra Patel contended that the application of the petitioner has not been rejected by the respondent No.3 on the ground of commission of an offence by the petitioner during the his overstay period in the year 1995. The respondents can support the order impugned in this special criminal application on the ground on which the same has been passed. They cannot supplement the ground which is not made a point to decline the prayer made by the petitioner for furlough by the respondent No.3.

#. I have given my anxious and thoughtful consideration to the rival contentions made by the learned counsel for the parties.

#. The grant and refusal of furlough are regulated in the State by The Prisons (Bombay furlough and parole) Rules, 1959 (hereinafter referred to as `the Rules, 1959). Rule 4 of the Rules, 1959, provides as to when the prisoner shall not be granted furlough. As many as eleven categories of prisoners are enumerated in Rule 4 of the Rules, 1959 who shall not be considered for release on furlough. For the present case, category No.4 is relevant and that reads as under:

> (4) Prisoners whose release is not recommended in Greater Bombay by the Commissioner of Police and elsewhere, by the District Magistrate on the ground of public peace and tranquillity.

In Rule 4 of the Rules, 1959, I do not find anything adverse against the prisoner in the matter of grant of

furlough on the ground that earlier he surrendered late. Category 4 of Rule 4 of Rules, 1959, however, justifies rejection of the prayer made for furlough by a prisoner where police has not recommended his release on the ground of public peace and tranquillity. In the case in hand, I find that the petitioner was declined the benefit of furlough by the respondent No.3 on the basis of the police report which reported that his release may result in breach of public peace. So it is an adverse police report given in the matter against the petitioner and it has been made a ground for declining him his due furlough placing in service the category No.4 of Rule 4 of the Rules, 1959.

#. Leaving aside whether the power exercised by the respondent No.3 under the Rules, 1959 is quasi-judicial or administrative or executive, even if it is taken to be a case of exercise of administrative/executive powers, an order made adverse to a person or citizen needs to be passed after adhering to the principles of natural justice where it ensues civil consequences or results in deprival of right conferred under the Rules. It is one of the important facets of principles of natural justice that an authority if makes use of some material to pass an adverse order against a person or a citizen, that material has to be furnished to the affected person and after taking his defence thereon, and considering the same, order has to be passed. In the case in hand, it is not in dispute that adverse police report is made use for denial of the petitioner's due furlough and that has not been made available to the petitioner. It is not a privileged document or a document of national secrecy where legitimately the privilege could have been claimed by the respondents not to give copy thereof to the petitioner. The respondent NO.3, being an officer of the Welfare State is expected to maintain transparency even in the administrative/executive actions. But the officers of the Welfare State are acting contrary to what it is expected from them. This adverse police report is one of the grounds for denial of furlough leave to the petitioner and behind his back, this report has been prepared, which was kept secret from him and without affording an opportunity of hearing to him, this order came to be passed. In the matter of quasi-judicial orders, where it results in deprival of some right to the person or citizen, adverse material used against him has to be made known to the affected person and after receiving and considering his objections, appropriate order may be passed. In the matter of administrative/executive actions also, principles of natural justice are to be followed. In view of this

position of law, the order of the respondent No.3 made in this special criminal application is invalid and it cannot be allowed to remain on file.

##. So far as the second ground is concerned, re. late surrendering of the petitioner earlier, it is suffice to say that it has been mentioned as a fact. Be that as it may. The commission of offence by the petitioner during this period of late surrender is not made a ground for rejection of the application of the petitioner for furlough. However, in case during the later surrender, the petitioner committed a heinous offence, certainly it may be a relevant consideration in the matter of grant or refusal of furlough to the prisoner and it may be taken into consideration by the respondent No.3. I find sufficient merits in the contention of the learned counsel for the petitioner that for late surrender once the prisoner is punished, it cannot be taken to be a ground for his rejection of due furlough in future. This aspect has been considered by the Full Bench of this Court and I cannot do better than to reproduce the relevant portion of the judgment, which is as follows:

i. In the context of later part of rule 4 (10) the word "shall" will have to be read as "may" and directory.

ii. The prison authorities cannot reject as ineligible the request of due furlough of the prisoners who have surrendered late in past.

iii. The authorities have the power and duty to consider grant or refusal of such furlough due to prisoners, having regard to the fcts and circumstances of the case including the fact that the prisoner had surrendered late in past. That would be one of the relevant factors to be taken into account.

iv. Another relevant fact to be taken into account will be the view taken regarding the gravity of the offence while imposing punishmnet under sec. 48A of Prisons Act read with rule 128 of the Jail Manual.

##. In this case, for late surrender, the petitioner is punished adequately and at the time of consideration of his application for next furlough which has become due, it cannot be taken into consideration as an adversity and

that too to the extent to summarily reject the application of the petitioner for furlough. However, the conduct of the petitioner during the period of his late surrender certainly may be a good and relevant consideration at the time of consideration of the application of prisoner filed for his next due furlough. The respondent No.3, no doubt, in his order has not made any reference to this conduct of the petitioner but at the same time it is also difficult to accept and believe that the respondent No.3 would not be aware of this fact of involvement of the petitioner in heinous offence committed by him during the period of his late surrender. It would have been better for the respondent No.3 and also in consonance with the principles of natural justice and fairplay that specifically this fact could have been mentioned in the order. However, in case what it is contended by the learned counsel for the respondent No.3 is correct and the petitioner committed a heinous offence during the period of late surrender, non-mentioning of that fact in the order will not be taken to be in favour of the petitioner to the extent that this Court has to grant relief in favour of the petitioner. It is a very serious matter which goes to show the conduct of the petitioner as well as it relates to the question of maintenance of public peace and it can be taken into consideration by the authority or by the Court. The respondent No.3 has not made reference to this aspect of the matter but only on this ground, the petitioner cannot be given a clean chit when this conduct of his may have relevancy relates to the public peace, safety and order. The petitioner certainly knows the fact of commission of offence by him during the period of overstay and he cannot be allowed to take the benefit of such technicality in the matter. Once a fact relating to and bearing relevance on the question of public peace has been brought to the notice of the Court it is its duty to adequately deal with the objection raised and pass appropriate order. Grant of furlough if ultimately may result in breach of public peace or tranquillity or other kind of harassment to the persons, then on such technical pleas in such matter where the Court is not only concerned with the right of an individual prisoner but also to the question of maintenance of public peace and tranquillity as well as possibility of adverse effect on the public at large, may not refrain from considering this fact. It is unfortunate that the respondents have not given out the complete details of the offence committed by the petitioner during the period of late surrender. Equally, the petitioner is also not cooperative. Though this fact was within his knowledge and it has to be stated by him in the petition, but the

same has not been stated. The conduct of the petitioner in the petition under Article 226 of the Constitution is a relevant and material and it is the duty of the petitioner to fairly and candidly disclose all the material facts relevant to the matter. In fact, the petitioner should have mentioned this fact in the writ petition but that has not been done. Learned counsel for the petitioner has also not denied this fact that during the period of late surrender, the petitioner alleged to have been committed an offence. In fact, this petition deserves to be dismissed only on the ground of concealment of the fact from the Court by the petitioner, but I am not adopting that course for the reason that the respondent No.3 has not rejected this application of the prisoner on this ground and the counsel for the respondents has not given out the details of the offence which is alleged to have been committed by the petitioner during his late surrender in the year 1995. However, from the reading of the order of the respondent No.3, one thing is clear that late surrender of the petitioner in the year 1995 is one of the important points which was there in the mind of the authority. When this point was there in the mind of the authority, certainly even if it is not mentioned specifically, this possibility cannot be ruled out that it would have vitally influenced the decision in the matter. However, in the facts of this case, I consider it to be appropriate to remit the matter to the respondent No.3 with direction to him to decide the same afresh expeditiously in accordance with the law.

##. In the result, this special criminal application succeeds and the same is allowed. The order of the inspector General of Prisons, Gujarat State, Ahmedabad, dated 3-1-2001 is quashed and set aside. The respondent No.3 is directed to decide the matter afresh after giving copy of the police adverse report together with the material on the basis of which the same has been prepared to the petitioner, and the petitioner is free to file his objections against the same within a period of 15 days of receipt thereof. The respondent No.3 is further directed to ascertain and to make know to the petitioner regarding the criminal case which is alleged to have been committed by him during the period of late surrender. The petitioner is free to file his objections against the criminal complaint filed against him for the offence alleged to have been committed during the period of late surrender. After receiving the petitioner's objections, the respondent No.3 to consider the matter in accordance with law and decide the same within a period of 15 days. While considering the point of late surrender, the respondent No.3 shall also take into consideration the

Full Bench decision of this Court in the case of Bhikhabhai Devshi vs. State of Gujarat (supra). The special criminal application and Rule stand disposed of accordingly with no order as to costs.

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